

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

ORIGINAL

76-1074

To Be Argued By
CARL D. BERNSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

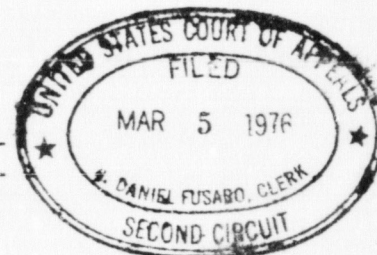
-against-

HERMENEGILDO DIAZ-CABALLERO,

Indictment Number
75CR 706

Defendant-Appellant.

APPELLANT'S BRIEF AND APPENDIX



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Cases:

Glasser v. U.S., 315 U.S. 60 (1942)

Martucci v. Brooklyn Children Association, 140 F. 2d 733 (1944)

Report of N.J. Sup. Court Committee on
Evidence, Sec.167 (1963)

Richardson on Evidence, Jerome Prince 10th Ed.
Brooklyn Law School 1973

U.S. v. Geaney, 417 F.20 1116 (2nd Cir.1969)

TABLE OF AUTHORITIES

U.S. v. Lopez, 420 F. 2d 313 (2d Cir. 1969)

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U.S. v. Wilner et al., Dock. 74-1955, dec.
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Waters v. Kings County Trust Co., 144 F 2d 680, (1944)

Weinstein on Evidence, Jack B. Weinstein,
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-against-

HERMENEGILDO DIAZ-CABALLERO,

Defendant-Appellant.

Docket No. 76-1074
Indictment No. 75CR 706

DEFENDANT-APPELLANT'S BRIEF

Preliminary Statement

The defendant-appellant (hereinafter "defendant") appeals from a judgment of the United States District Court for the Southern District of New York, entered October 15, 1975, convicting him of conspiracy to distribute heroin and possession of heroin. He was sentenced to a term of imprisonment for up to six years, followed by three years of special parole. The defendant was tried before the Honorable Lloyd F. MacMahon and a jury on September 2nd and 3rd 1975, and he is currently incarcerated.

Statement of Facts

This case involves three independent sales of heroin to an undercover agent, one Detective Jose Luis Guzman.

In essence, Detective Guzman stated that he was employed by the New York City Police Department as an undercover policeman. He said that on June 3, 1975 he was taken to the vicinity of Third Street between Avenues B and C in Manhattan, by an informant, who introduced him to one Rafael Gonzalez, also known as Flako. After the introduction, Guzman testified that Gonzalez left and returned with an ounce of heroin, and he paid Gonzalez approximately \$1800. He said that he left Gonzalez without any further talk or assurance of future deals.

Subsequently, on June 23rd, at a meeting again set up by the informant, Guzman met with Gonzalez, and ordered an additional quantity of heroin from him. They negotiated over price and quantity, and a deal was made wherein Guzman bought approximately one and one-half ounces for the sum of \$2775.

In early July 1975, Guzman visited Gonzalez at an apartment on Tenth Street in New York City, where Gonzalez gave him a small sample contained in tin foil which he asked Guzman to check out. Guzman subsequently placed a somewhat

large order with Gonzalez, and agreed to purchase a quantity of heroin for \$26,000. He left Gonzalez with a telephone number where he was to be called the next day.

On July 8, 1975, Gonzalez called Guzman and they agreed to meet at 10th Street in Manhattan, at approximately 2 P.M. Gonzalez called Guzman again, and a meeting was set up in the vicinity of 10th Street. They met, talked, and then Gonzalez left and returned with the defendant, and said that the defendant was his partner. The defendant said nothing. Gonzalez then entered Guzman's car, and then both he and the defendant drove away. Gonzalez and the defendant returned several times, and he finally told Guzman that the deal would have to be consummated at a gas station located on Houston Street. Gonzalez and the defendant then drove away. They drove to a Shell station, whereupon Guzman got out and walked to the station with Gonzalez. The defendant asked Gonzalez for the money and was told that it was in Guzman's car. Gonzalez then took the package containing heroin from the trunk of a car and showed Guzman the plastic bags. These bags containing the heroin were located within the parameters of a brown paper shopping bag. The defendant placed the shopping bag into the rear of an automobile. There was a conversation between Guzman and the defendant concerning the weight

of the package and the defendant offered to let Guzman weigh it. The defendant then took the package from the trunk of one car and placed it in Guzman's car, whereupon Guzman and Gonzalez apparently completed their deal. Immediately thereafter, the defendant was arrested.

STATEMENT OF ISSUES

1. Where there is no independent evidence of the existence of a conspiracy, should hearsay statements by one alleged co-conspirator be admitted in the absence of such independent evidence? The Court below said Yes.

2. Where a defendant has made an exculpatory statement to an assistant U. S. Attorney, should such statement be admitted when the prosecution has been permitted to introduce hearsay apparently implicating the defendant in a conspiracy to sell drugs? The Court below said No.

POINT I

THERE WAS NO INDEPENDENT EVIDENCE
TENDING TO SHOW A CONSPIRACY WHICH
WOULD PERMIT HEARSAY TESTIMONY OR
TESTIMONY OF INDEPENDENT CRIMES.

In this proceeding, the conviction of Diaz-Caballero is based entirely on the hearsay testimony given by Detective Guzman concerning statements by Gonzalez. No independent evidence has been presented to show that a joint venture existed between Gonzalez and Diaz-Caballero prior to July 8, 1975.

In essence, Detective Guzman testified that Diaz-Caballero was introduced to him on July 8th by Gonzalez as his partner without any further explanation (T 26).

It is an elementary rule that the declarations of one party to a joint venture are admissible against the others provided that the defendant, against whom the declarations are offered, is shown by independent evidence to have been a party to the joint venture. U.S. v. Ragland 375 F. 2nd 471, 476-77 (2nd Cir. 1967).

In reaching a determination as to the admissibility of the hearsay evidence of Detective Guzman, the court must exercise its discretion in finding, by a fair preponderance of the hearsay utterance, that a conspiracy exists. U.S. v. Geaney 417 F.2nd 1116 (2nd Cir. 1969). In following Geaney, the Second Circuit, in U.S. v. Lopez 420 F.2nd 313 (2nd Cir. 1969) has stated, "The standard to be applied in reviewing the trial is whether the proof other than the hearsay declarations affords reasonable grounds to find that the defendant participated in a common venture with the declarant."

In the instant case, defendant Diaz-Caballero has been convicted of conspiracy on three separate sales of heroin which were effectively commenced and completed independent of each other by the declarant Gonzalez and Guzman. Detective Guzman testified that he met the declarant Gonzalez on June 3, 1975 through a confidential informer (T 43) and purchased an ounce of heroin for \$1840 (T 19) without any further discussion as to possible subsequent purchases. In fact, Guzman had no further dealings with Gonzalez until the meeting on June 23, 1975 which was arranged by the confidential informer in order for Guzman to purchase a second quantity of heroin. In fact, it was at this meeting that Gonzalez indicated that he had an undisclosed "connection" who wished to remain incognito, but without any evidence of his having a business partner (T 56-57).

Subsequent to the completion of this sale, Guzman and Gonzalez met to discuss an independent purchase of approximately one pound of heroin. On July 8th the defendant Diaz-Caballero was introduced to Guzman as Gonzalez' partner by Gonzalez himself. To accept such evidence as a basis for the existence of a conspiracy of sale in three separate sales of heroin where there is no proof of any conspiracy, is to fall short of having the quantum of proof sought by the Second Circuit in U. S. v. Lopez, supra.

The only proof is the three independent sales in which Guzman and Gonzalez participated. The testimony shows that each sale was independently concluded without any indication or discussion of any subsequent sales. Guzman's testimony shows that the government agent, i.e., the confidential informer, solicited all subsequent sales on behalf of the government. There is no evidence in the testimony of solicitation on the part of either Gonzalez or the defendant.

The admissibility of this evidence and the ultimate issue of guilt are clearly identical (Weinstein on Evidence, Matthew Bender 1975 Vol. I-104). Consequently, in making a decision as to the admissibility of this evidence the court is

also deciding on the probable guilt of the defendant, which is a matter solely for the jury to determine.

A declaration by a co-conspirator is not considered to be hearsay (Fed. Rules of Evidence, 801d 2E) and therefore admissible over the alleged objections of a co-conspirator only if there is proof aliunde that the defendant is connected with the conspiracy. Otherwise, this hearsay evidence, which is not substantiated and is too slight, will lift itself by its own bootstraps to the level of competent evidence. Glasserv. U.S., cf. U.S. v. Bentuena, F.R. of E. 104(a). Scholars in the field of evidence commented on the widespread use of this evidence as being insufficient to prove the actual conspiracy.

Richardson on Evidence, 10 Ed. Jerome Prince §244:

"The rule in the Second Circuit that extrajudicial declarations of conspirators are 'admissible against a (defendant) once the trial judge . . . concluded by a fair preponderance from proof other than such declarations that the appellant was shown to be a member of the conspiracy,' United States v. Cohen, 489 F.2d 945, 950 (2d Cir.1973), is unsound not only because it sets too low a standard, but because it precludes the court's reliance on statements despite Rule 104(a), discussed under that rule. The standard, as indicated by the Supreme Court, is at least enough evidence to take the question to the jury. United States v. Nixon, 418 U.S. 683, n 14, 94 S. Ct. 3090, 3104 n. 14, 41 L. Ed. 2d 1039, 1060 n. 14 (1974) ('As a preliminary matter, there must be substantial independent evidence of the conspiracy,

at least enough to take the question to the jury. United States v. Vaught, 385 F. 2d 320, 323 (CA 4 1973); United States v. Hoffa, 349 F 2d 20, 41-42 (CA 6 1965), aff'd on other grounds, 385 U.S. 293 (1966); United States v. Santos, 385 F. 2d 43, 45 (CA 7 1967), cert. denied, 390 U.S. 954 (1968); United States v. Morton, 483 F. 2d 573, 576 (CA 8 1973), United States v. Spanos, 462 F. 2d 1012, 1014 (CA 9 1972); Carbo v. United States, 314 F. 2d 718, 737 (CA 9 1963), cert. denied, 377 U.S. 953 (1964). "

This view is further supported by legislative bodies (Report of N.J. Supreme Court Common Evi. §167-1963). "To admit hearsay statements of a co-conspirator merely because of a highly controversial belief that they are more likely to be true than not is insufficient . . . That such evidence is highly unreliable . . . The hearsay statement of an alleged co-conspirator is most suspect of all. To permit criminal convictions to be based on such evidence would indeed be unfair."

It is the defendant's contention that when an out of court statement by a co-conspirator is being offered without producing the co-conspirator, the trial judge must determine whether in the circumstances that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of any examination.

In this case we have no idea whether Gonzalez meant that Diaz-Caballero was his partner in this venture only or in all three ventures. Another possibility is that Diaz-Caballero was acting only under Gonzalez' direction as a security precaution to insure the safety of the monies being received by Gonzalez. There appears to be no indicia of reliability since it is impossible to know what was meant by the declarant or whether in fact there was any truth to the statement itself. One cannot infer from the declaration that the defendant had any intent or knowledge of conspiracy in order to freely associate himself with it (U.S. v. Bentuena, supra).

The government has failed to show, by independent evidence, a continuing conspiracy in which the defendant had a direct hand in the entire operation, sufficient to sustain the charge and employ the exception provided by the Federal Rules of Evidence, 801 02E, U.S. v. Wilner, et al. The standard to be applied in the instant case is: if, absent the declaration of a co-conspirator the independent evidence shown is sufficient to bring a question to the jury as to the conspiracy, then and only then can the judge properly admit the declaration.

POINT II

FEDERAL RULE 806 REQUIRES THAT A
DEFENDANT BE GIVEN AN OPPORTUNITY
TO EXPLAIN ALL ADMISSIONS MADE
UNDER FEDERAL RULE 801d(2)

Where the trial court has admitted the statement of a co-conspirator against a defendant based upon his admission by silence and conduct, which conduct is being used as independent evidence of the conspiracy, such conduct is subject to an explanation. Richardson on Evi. §200, supra.

The Federal Rules of Evidence, 806 & 613(6) codify the common law regarding explanations by the party in which an admission is being offered against a party. Rule 806 covers those areas which are no longer hearsay and gives the party a basis for attacking and defending his position as to evidence admitted under 801d(2) which is not covered by 613(6). Its primary purpose is to attack hearsay in any manner by evidence which is calculated to explain the apparent inconsistency between the admission and his present position on trial. Martucci v. Brooklyn Children Association, 140 F.2d 733 (1944).

In attempting to explain his actions with and declarations to Detective Guzman, the defendant tried to introduce, through the testimony of Agent Checkoway, a statement made shortly after his arrest. This testimony would either have modified or destroyed the effect of the admission against the defendant, but it was excluded as hearsay statement. See Water v. Kings County Trust Co., 144 F. 2nd 680 (1944); U. S. v. Geaney, supra. Here the statement was made under conditions and circumstances conducive to veracity, which could establish either a cause of action or a defense. The court could therefore bring to the attention of the jury the requirements of law as to admission and the reasonableness of the explanation. This inherent right was denied to the defendant when through his statement he was basically maintaining that he had been hired to aid Gonzalez in securing his monies for this one transaction.

It is in fact inconsistent with the purpose of the Federal Rules of Evidence to permit the Government to introduce crucial hearsay evidence against the defendant while at the same time denying to the defendant the same opportunity to explain it. The statement given to the Government should have been admitted.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED.

Respectfully submitted,

Carl D. Bernstein, Esquire
of counsel

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

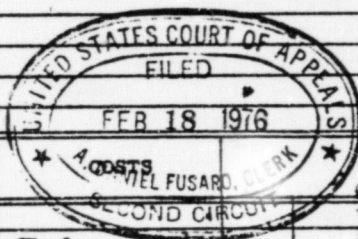
JUDGE MAC MAHON

75 CRIM. 706

C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Michael Q. Carey, AUSA
HERMENEGILDO DIAZ-CABALLERO a/k/a Puton-1&4	791-0068
EFRAIN MALDONADO-1&4 N/G	
RAFAEL GONZALEZ-1-4	

For Defendant:



STATISTICAL RECORD	DATE	NAME OR RECEIPT NO.	REC.	DISK
J.S. 2 mailed	Clerk			
J.S. 3 mailed	Marshal			
Violation	Docket fee			
Title 21				
Sec. 846, 812, 841, (a)(1), (b)				
Consp. to viol. Fed. Narco. Laws. (Ct. 1)				
Distr. & possess. w/intent to distr. Heroin, L. (Cts. 2-4)				
(Four Counts)				

DATE	PROCEEDINGS
7-18-75	Filed indictment. B/W ordered as to deft. Rafael Gonzalez. Conner, J. B/W issued.
7-21-75	Adjourned to 7-28-75.
7-28-75	Maldonado (atty. present) Pleads not guilty. Bail fixed at \$10,000. PRB continued. Diaz Caballero (aty. present) Pleads not guilty. Bail fixed in the sum \$15,000. P.R.B. secured by \$1,500. cash and bond Gonzalez- B/W ordered. Court directs entry of not guilty plea. Case assigned to Judge MacMahon for all purposes. Conner, J. Caballero- REMAND issued.
7-1-75	DIAZ CABALLERO- Filed Appearance Bond in the sum of \$15,000. Cash - Name of Surety: Carmelo Garay. Receipt # 55678 --CLERK.
7-21-75	DIAZ-CABALLERO- Filed Notice of Appearance of Atty. Carl Bernstein, 485 Madison Ave. N.Y.C. 10022 Tel#980-3890.

(Cont'd on Page #2)

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PROCEEDINGS

-75 DIAZ-CABALLERO= Filed Deft's Notice of Motion to Inspect Grand Jury Minutes.
 -75 " " - Filed Deft's Motion to Disclose Tapes, Logs, Records & Memoranda.
 -75 " " - Filed Deft's Motion for A Bill Of Particulars.
 -75 " " - Filed Deft's Motion for Discovery & Inspection.
 -75 " " - Filed Deft's Omnibus Motion to Sever, Suppress & Strike Surplusage.
 2-75 EFRAIN MALDONADO= Filed Deft's Notice of Motion & Affdvt to sever and suppress,
 To disclose Tapes, Logs, etc.
 13-75 DIAZ CABALLERO= Filed REMAND issued 7-28-75.
 20-75 Filed affdvt of Marc Marmaro, A.U.S.A., in oppositions to the motions of Deft's for
 inspection of Grand Jury minutes, and all else as indicated.
 20-75 Filed Govt's memorandum of Law in opposition to Deft's pre-trial motions.
 22-75 DIAZ-CABALLERO= Filed MEMO ENDORSEMENT on Defts Notice of Motion to Inspect Grand Jury
 Minutes. Accordingly the Motion is DENIED—SO ORDERED—MacMAHON, J.
 22-75 DIAZ-CABALLERO= Filed MEMO ENDORSEMENT on Deft's Notice of Motion to disclose Tapes,
 Logs, Records & Memoranda. The Motion is GRANTED in part and DENIED in part—MacMAHON, J.
 22-75 DIAZ-CABALLERO= Filed MEMO ENDORSEMENT on Defts Motion for a Bill of Particular filed
 August 8, 1975. Motion is GRANTED in part and DENIED in part. SO ORDERED—MacMAHON, J.
 22-75 DIAZ-CABALLERO= Filed Memo ENDORSEMENT on Deft's Notice of Motion filed August 8, 1975.
 Motion is DENIED in part and GRANTED in part. SO ORDERED—MacMAHON, J.
 22-75 DIAZ-CABALLERO= Filed MEMO ENDORSEMENT on Deft's Omnibus Motion to Sever, Suppress &
 Strike Surplusage filed August 8, 1975. Motion DENIED. SO ORDERED—MacMAHON, J. (m/n 8-25-75)
 for all 5 Memo
 22-75 EFRAIN MALDONADO= Filed MEMO ENDORSEMENT on Deft's Notice of Motion & Affdvt to Sever
 and Suppress, etc., filed August 12, 1975. The Motion is GRANTED in part and DENIED
 in part. SO ORDERED—MacMAHON, J. (m/n 8-25-75)
 7-75 Filed Govt's Bill of Particulars.
 7-75 DIAZ-CABALLERO= Filed MEMO ENDORSEMENT on Defts notice of Motion to Suppress Deft's
 statement filed 8-22-75. The within motion to suppress is denied following a hearing
 for the reasons dictated into the record on this date. SO ORDERED—MacMAHON, J. (m/n)
 3-75 EFRAIN MALDONADO= Filed MEMO ENDORSEMENT on Deft's notice of Motion to Sever and
 Suppress, etc., filed 8-12-75. The within motion to suppress is DENIED following
 a hearing for the reasons dictated into the record on this date. SO ORDERED—MacMAHON, J. (m/n)
 22-75 RAFAEL GONZALEZ= Deft (Atty Maloney present) pleads NOT GUILTY. No application for Bail
 Deft. remanded. Hearing set for 8-27-75 at 10:AM—Mac MAHON, J.
 27-75 Motion to Suppress -Re. DIAZ-CABALLERO & MALDONADO - Hearing held -Motion DENIED—MacMAHON, J.
 2-75 RAFAEL GONZALEZ= Deft (Atty R. Mitchell present) withdraws plea of NOT GUILTY and pleads
 GUILTY to COUNT 4. P.S.B.O. 10-15-75 Sentence @ 10:00AM
 2-75 TRIAL BEGUN on other DEFT'S.
 3-75 TRIAL continued and concluded. Jury finds Deft. DIAZ-CABALLERO GUILTY on COUNTS 1 to 4.
 Jury finds Deft MALDONADO NOT/GUILTY on COUNTS 1 to 4.
 Deft CABALLERO bail revoked. Deft Remanded— Sentence
 10-15-75 @ 10:00 AM.
 1-19-75 Filed transcript of record of proceedings, dated August 27, 1975

Cont'd on Page #3)

DATE

PROCEEDINGS

10-6-75 HERMENEGILDO DIAZ- Mailed original CIA-21 Copy #1 to the A.O., Wash, DC for payment.--Mr. MACMAHON, J.

10-6-75 HERMENEGILDO DIAZ- Filed CIA appointment of Interpreter, Norma S. Seltzer, 20 East 35th Street, NYC 10016 --MacMAHON, J.

10-6-75 RAFAEL GONZALEZ- Mailed original CIA Copy #1 to the A.O., WASH, D.C., for payment.--MacMAHON, J.

10-6-75 RAFAEL GONZALEZ- Filed CIA #20 Appointment of Counsel, Andrew J. Maloney, 1290 Ave of the Americas, NYC 10019--MacMAHON, J.

10-15-75 RAFAEL GONZALEZ- Filed Judgment & Commitment Order - The Def. is hereby committed to the custody of the Atty General for imprisonment for a period of EIGHTEEN (18) MONTHS, and THREE (3) YEARS SPECIAL PAROLE, on COUNT #1. COUNTS 1,2,3, are DISMISSED on motion of Def't's counsel with consent of the Government.--MacMAHON, J.

10-15-75 HERMENEGILDO DIAZ-CABALLERO- Filed Judgment & Commitment Order - The Def't is hereby committed to the custody of the Atty General for imprisonment for a period of SIX (6) YEARS, and THREE (3) YEARS SPECIAL PAROLE, on each of COUNTS #1 and #4 to run concurrently with each other. Court recommends that the Def't's CABALLERO AND GONZALEZ be placed in different institutions.--MacMAHON, J.

10-23-75 HERMENEGILDO DIAZ- Filed Def't's Notice of Appeal to the u.s.c.a., for the 2nd Circuit from the Judgment entered on October 15, 1975. (mailed copies).

1-7-75 RAFAEL GONZALEZ- Filed commitment & entered return. Def't delivered to Warden, Metro Corr. Cntr. NYC on 10-15-75.

1-7-75 HERMENEGILDO DIAZ- Filed commitment & entered return. Def't delivered to Warden, Metro Corr. Cntr. N.Y.C. on 10-15-75.

A TRUE COPY
 RICHARD E. EDEHARDT, Clerk
 Clerk

By *G. E. Thompson* Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----X
UNITED STATES OF AMERICA,

-v-

HERMENEGILDO DIAZ-CABALLERO,
a/k/a Puton, EFRAIN MALDONADO,
and RAFAEL GONZALEZ,INDICTMENT

75 Cr. 706

Defendants.
-----X

The Grand Jury charges:

1. From on or about the 1st day of June, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERMENEGILDO DIAZ-CABALLERO, a/k/a Puton, EFRAIN MALDONADO, and RAFAEL GONZALEZ, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about June 3, 1975, RAFAEL GONZALEZ, the defendant, possessed approximately 24.84 grams of heroin.

2. On or about June 23, 1975, RAFAEL GONZALEZ, the defendant, possessed approximately 36.66 grams of heroin.

3. On or about July 8, 1975, RAFAEL GONZALEZ and HERMENEGILDO DIAZ-CABALLERO, a/k/a Puton, the defendants, had a conversation.

4. On or about July 8, 1975, HERMENEGILDO DIAZ-CABALLERO, a/k/a Puton, and EFRAIN MALDONADO, the defendants, possessed approximately 494.59 grams of heroin in the trunk of the automobile of EFRAIN MALDONADO, the defendant.

5. On or about July 8, 1975 HERMENEGILDO DIAZ-CABALLERO, a/k/a Puton, the defendant, opened the trunk of the automobile of EFRAIN MALDONADO, the defendant.

6. On or about July 8, 1975, RAFAEL GONZALEZ, the defendant, removed a package containing approximately 494.59 grams of heroin from the trunk of the automobile of EFRAIN MALDONADO, the defendant.

7. On or about July 8, 1975, HERMENEGILDO DIAZ-CABALLERO, a/k/a Puton, the defendant, placed a package containing approximately 494.59 grams of heroin into the trunk of the automobile of EFRAIN MALDONADO, the defendant.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 3rd day of June, 1975, in the Southern District of New York, RAFAEL GONZALEZ, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 24.84 grams of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A).)

COUNT THREE

The Grand Jury further charges:

On or about the 23rd day of June, 1975 in the Southern District of New York, RAFAEL GONZALEZ, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 36.66 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FOUR

The Grand Jury further charges:

On or about the 8th day of July, 1975, in the Southern District of New York, HERMENEGILDO DIAZ-CABALLERO, a/k/a Puton, EFRAIN MALDONADO, and RAFAEL GONZALEZ, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 494.59 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

Foreman

PAUL J. CURRAN
United States Attorney

AFTERNOON SESSION

2:30 p.m.

(In open court; jury present)

CHARGE OF THE COURT

MacMahon, J.

All of us in this courtroom have different functions:

It is the lawyers' function to prepare their case and to present the evidence to you and make their closing arguments at the end of the case.

It is the judge's function to rule on all questions of law that come up during the trial, and at this point in the trial it is my function to instruct you on the law that applies to this case.

Now, I am the exclusive judge of the law, and just as I am the exclusive judge of the law, you are the exclusive judges of the facts. You and you alone determine the weight and the value of the evidence, you determine whether to believe or not to believe a witness, and ultimately decide the guilt or innocence of these defendants on the charges made against them here solely on the basis of the evidence as you recall it and the law as I give it to you in these instructions.

Now, you are not to conclude from any ruling that

I made during the trial or any questions that I asked that I have any opinion about the guilt or innocence of these defendants, one way or the other. That is your exclusive function and that decision is exclusively up to you.

Now, how do you go about this? How do you go about finding what the facts are here, just where the truth lies?

Here you should consider the exhibits which have been received in evidence and the testimony of all of the witnesses, both on direct and on cross-examination. Sift out what you believe. Weigh it in the scale of your reasoning powers and your common sense, and decide just what the evidence supports and where the truth lies in this case.

Now, in this connection, all evidence is of two general types: direct evidence and circumstantial evidence.

Direct evidence is evidence that is based on a document that is received in evidence or a physical object that is received in evidence, or on the testimony of witnesses who have seen or heard what they testified about, some knowledge they have about the facts which they derived from the exercise of their sight, their hearing, their touch or any of their five fundamental physical senses.

Now, circumstantial evidence is simply the drawing

of a logical conclusion from facts which are shown in the direct evidence. Let me give you a simple illustration.

The classic example of circumstantial evidence is Robinson Crusoe's conclusion that there was another man on his deserted island from his observation of the footprint on the sand. The footprint on the sand was direct evidence. He knew that he hadn't made that footprint himself, and so he drew the only logical conclusion, in fact the inescapable conclusion, that there was another man on the island.

Now, not all evidence, circumstantial evidence, is quite that clear or quite that compelling, but the principle is a simple one and we all use it in our daily lives. We draw logical conclusions from other connected facts and the process is no different here from what you use in your daily lives.

Circumstantial evidence is every bit as valid as direct evidence, for in either case, before the Government can establish the guilt of the defendants, before you can convict any defendant, the Government must establish that defendant's guilt beyond a reasonable doubt. I will come to that momentarily.

It is also your memory of the evidence that controls here. It is not the way I remember it and it is

not necessarily the way the lawyers remember it. To the extent that your memory of the evidence squares with the lawyers' memory of it as they made their closing arguments to you, you may accept what they say. But to the extent that you have a different memory of it, you are bound by your oath to reject what they said and rely on your own memory.

Now, when I say "your own memory," I mean your collective memory, the memory of the jury as a whole.

Sometimes jurors, shortly after they retire, send me a note, "We want the testimony of this witness and the testimony of that witness," before they hardly sat down at the jury table. Before you do that, try to see whether if you can't remember it one of your fellow jurors can remember it and help to refresh your recollection and stimulate your own memory of it. In that way your discussions can proceed.

But, in the last analysis, if you want any of the evidence read back, I will have the court reporter read it back to you. But remember that that takes a little time to find it through his stenotype notes and be patient while we do it, and pinpoint what you want, and if you do want it your foreman will have to send me a note telling me what you want, and try to be as precise as you can. But please

exercise restraint about that.

This has fundamentally been a rather simple case. It is a short trial. There are three transactions involved, and I'm sure you are all pretty familiar with them by this time.

I do not intend, because this is a short case and because you have listened to over an hour of summations on both sides, to sum up the evidence. That is not my function.

Now, one of your most important functions is to decide which witnesses you are going to believe, and this is so as to every witness. The mere fact that a witness is called by the Government doesn't entitle him to any greater credibility than any other witness. You must judge his trustworthiness and his believability by the same rules that apply to every witness.

In this connection, you are not to be concerned with the number of witnesses called. You are concerned not with the quantity of evidence, but with the quality of it.

The first test which you ought to apply in determining whether to believe a witness is to measure what he says against your plain everyday common sense and experience. You are not bound to believe unreasonable statements or to accept testimony that insults your

2 intelligence just because the statements are made under oath
3 in a courtroom.

4 Now, you saw the witnesses in this case. In
5 deciding whether to believe a witness you should consider
6 not only what he said but how he said it and his manner
7 on the stand.

8 I saw you watching these witnesses with great
9 scrutiny and particular care as they were testifying.
10 How did the witness impress you? Obviously, you were sizing
11 him up.

12 Was the witness being frank with you or was he
13 being evasive? Did his version of the evidence appear to
14 be straightforward? Did the witness have any motive to
15 testify falsely? Is he interested in any way in the outcome
16 of this case?

17 How strong or weak was his memory? And here
18 that is probably more so than most cases, because you may
19 have observed that we are dealing here with a case which
20 started, the alleged conspiracy, about ninety days ago,
21 on June 3rd, so this isn't a case where memories have
22 grown stale. We are talking about a period that commenced
23 ninety days ago.

24 In short, you should ask yourselves whether you can
25 rely on the witness. Can you trust him? Was he hostile or

friendly to either side? What was his opportunity to know the facts about which he testified, and what were the probabilities or the improbabilities of what he said? How does his testimony check out with all the other evidence and particularly the documentary evidence? Are there any inconsistencies in his testimony? If so, how important are they? And has he made any inconsistent statement on some earlier occasion and, if so, how important is that?

Now, if you find that any witness has deliberately and wilfully lied as to any material fact in his testimony at this trial, you may follow either one of two courses:

If you wish, you may reject his entire testimony, or, if you wish, you can accept as much of testimony as you believe and reject the rest.

Before discussing the crimes charged here, I want to remind you that an indictment is a mere accusation. It is not evidence of the truth of the charge made, and you are to draw no inference of guilt from the mere fact that the defendants have been indicted. An indictment means no more and no less than that a defendant has been accused of a crime.

Each defendant here has denied the charge made against him by his plea of not guilty. The defendant, as I

2 told you earlier, has no burden of proof whatever to
3 sustain in this case. He is presumed to be innocent, and
4 this presumption of innocence continues throughout the
5 trial and during your deliberations, and this presumption
6 of innocence is overcome when, and only when, the Government
7 establishes the guilt of a defendant beyond a reasonable
8 doubt.

9 Now, what do I mean by reasonable doubt?

10 As the phrase implies, a reasonable doubt is a
11 doubt that is based upon reason, a reason which appears in
12 the evidence or in the lack of evidence. It is not some
13 vague, speculative, imaginary doubt, nor a doubt based upon
14 emotion or sympathy or prejudice or upon what some juror
15 might regard as an unpleasant duty.

16 The Government is not required to prove the guilt
17 of a defendant beyond every possible doubt, nor to an
18 absolute or mathematical certainty, because such measure of
19 proof is usually impossible in human affairs.

20 You should review the evidence as you remember it,
21 sift out what you believe, discuss it with your fellow
22 jurors, compare your views of the evidence with an open
23 mind. Now, if that process produces a solemn belief or
24 conviction in your mind, such as you would be willing to
25 act upon without hesitation if this were an important matter

of your own, then you may say that you have been convinced beyond a reasonable doubt.

On the other hand, if your mind is wavering or so uncertain that you would hesitate before acting if this were an important matter of your own, then you have not been convinced beyond a reasonable doubt, and you must acquit the defendant whom you are considering.

At the outset here, I wish to point out that although this indictment originally contained four counts, only Counts 1 and 4 remain for your consideration. Each of Counts 1 and 4 charges a separate offense or crime and you must consider each of those counts separately.

I also wish to point out that although the indictment names three defendants, only two are on trial before you. They are Hermengildo Diaz-Caballero, also known as Puton, and Efrain Maldonado. They are the only persons whose guilt or innocence you must announce in your verdict, although, as I will explain to you shortly, in considering a defendant's guilt or innocence you may have to determine the nature of the participation, if any, of others, here, for example, of Rafael Gonzalez.

Now, in the determination of innocence or guilt, you must bear in mind that guilt is personal. The guilt or innocence of each defendant on trial before you must be

determined separately with respect to him, solely on the evidence presented against him or on the lack of evidence.

Let us turn now to the specific charges against these defendants.

Count 1 of the indictment charges a conspiracy. It charges that Diaz-Caballero, as we have called him throughout this trial, also known as Puton, Maldonado and Gonzalez, and others to the grand jury unknown, conspired to violate the federal narcotics laws. I will refer now to Count 1 as the conspiracy count.

In order to convict a defendant on Count 1, the Government just prove to your satisfaction beyond a reasonable doubt each of the following three elements:

1. The existence of a conspiracy from on or about June 1, 1975, and continuously thereafter up to and including the date of the filing of this indictment, July 18, 1975, knowingly and intentionally to distribute heroin or to possess heroin with an intent to distribute it;

2. That a defendant joined the conspiracy with knowledge of its unlawful purpose; and

3. That any one of the co-conspirators committed at least one overt act in furtherance of the objects of the conspiracy.

I will now discuss these elements in a little more

2 detail.

3 The first element of the crime is the existence
4 of a conspiracy.

5 Now, what is a conspiracy?

6 A conspiracy for our purposes is simply a
7 combination or an agreement knowingly made by two or more
8 people to commit a crime. Here specifically the Government
9 must prove that there was an agreement made by two or more
10 people or that two or more people combined or associated
11 together for the purpose of dealing in narcotics. Thus,
12 a conspiracy is a kind of a partnership, a joint enterprise
13 in criminal purposes and criminal conduct.

14 Now, this does not mean that two or more people
15 must meet and sign some kind of a formal partnership
16 agreement or that they must sit down and agree, in so many
17 words, on what their unlawful scheme is to be or how they
18 are going to carry it out or what their shares in this illicit
19 enterprise are to be. Indeed, when persons enter into a
20 combination or an agreement to commit a crime, much is left
21 to implication and to tacit understanding. Conspirators
22 do not proclaim their unlawful plans or publicly announce
23 their criminal purposes. The very nature of a conspiracy
24 usually calls for secrecy and intrigue.

25 The first element is satisfied, therefore, if you

find beyond a reasonable doubt that any two or more people, whether or not it is these two defendants on trial, any two people in any way intentionally combined or agreed to a common plan knowingly and intentionally to distribute heroin or to possess heroin with an intent to distribute it.

Now, in determining whether there was such a combination or understanding or agreement, you should consider all of the evidence about each defendant's conduct, acts and statements. You should consider not only what he said or did, but also the way he said or did it, and also the actions and conduct of alleged co-conspirators such as Gonzalez. Actions speak louder than words.

You should, therefore, ask yourselves whether these transactions shown in the evidence here were conducted in an open and in a straightforward manner as honest and legal transactions are, or whether they were purposely made circuitous and devious, whether the persons involved concealed or tried to conceal their identities in any way, whether they dealt in cash, and any other evidence which you can recall and believe as to the manner in which these defendants carried on their affairs shown in the evidence, and whether the defendants' dealings were open and aboveboard or whether they were surrounded by secrecy and intrigue and deviousness and hidden methods, which are

2 the hallmark of illicit and criminal conspiracies.

3 From the point of view of the law, there is
4 danger to the public when two or more people combine to
5 commit a crime. The danger is greater than when the lone
6 criminal acts alone, because two or more people have
7 greater strength and are able to accomplish crimes that
8 are more difficult and more harmful to the public.
9 Because of this, a conspiracy to commit a crime is a
10 distinct crime in and of itself, separate and apart from
11 the crime which it is the object of the conspiracy to
12 accomplish.

13 Thus, a conspiracy may be found to exist although
14 the purpose of the conspiracy is never accomplished.
15 Here, for example, there never need be any distribution
16 of heroin or any possession of heroin with an intent to
17 distribute it; it is enough if the Government proves beyond
18 a reasonable doubt that two or more people entered into
19 a combination or an agreement to distribute narcotics or
20 to possess narcotics with an intention to distribute it.
21 The very agreement is in itself a crime.

22 Proof, however, of the accomplishment of the
23 objective or the purpose of the conspiracy is the most
24 persuasive evidence of the existence of the conspiracy
25 itself.

Now, the period of time charged in the indictment here runs from about June 1, 1975 and continuously thereafter up to and including July 18, 1975.

It is not necessary for the Government to prove that the conspiracy alleged started and ended on those specific dates; it is sufficient if you find that a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment.

Now, you will recall that the second element which the Government is required to prove beyond a reasonable doubt to establish the crime of conspiracy is that a defendant joined the conspiracy with knowledge that its purpose was knowingly to distribute heroin and to possess heroin with an intention to distribute it.

Now, when I say joined the conspiracy, I do not mean that a defendant has to file some sort of an application for membership. However, before one can be found to be a member of a conspiracy, he must know of the existence of the conspiracy, that is, he must know that others have joined to violate the law, to commit the crime. He must know of the unlawful purpose of the conspiracy: here, that the purpose was to deal in narcotics. And he must knowingly and voluntarily join in the venture with an intention to

2 combine with others to violate the law. He must knowingly
3 promote the scheme.

4 You will note that I have said that the defendant
5 must have acted knowingly, wilfully and intentionally,
6 and this is one of the key issues in this case, because
7 both defendants contend here that they didn't know what was
8 going on here, they didn't know. That is for you to decide.

9 Now, when I use the words, "knowingly, wilfully
10 and intentionally," I do not mean that a defendant must
11 be aware that his conduct is criminal or that it is against
12 the law or that it violates some section of the United
13 States Code. He doesn't have to know that. "Knowingly"
14 means simply that he must know what he is doing, that he
15 acts freely and voluntarily, not because of any compulsion,
16 that he acts deliberately and on purpose and not because
17 of some mistake, accident, carelessness or other innocent
18 reason.

19 Here, again, in determining the intent of the
20 defendant you obviously cannot look into his mind. However,
21 you can determine intent and knowledge from inferring
22 what goes on in a person's mind from the way he acts, by
23 his statements and by all the surroundings. And here,
24 again, the old adage, actions speak louder than words,
25 applies.

1
2 The mere fact, however, that a defendant may
3 be present when a crime is committed or may witness a
4 crime by others, or that he attends meetings, or that he
5 unwittingly or unknowingly assists the venture or associates
6 or has a friendship or business dealing with a member of
7 the conspiracy is not in itself enough to make him a
8 conspirator unless you first find beyond a reasonable doubt
9 that he knew of this conspiracy, that he intentionally
10 joined in the criminal plan with knowledge of its unlawful
11 purpose.

12 One may become a member of the conspiracy without
13 knowledge of all of the details or all of the operations
14 of the conspiracy, or even with knowledge of who all of the
15 other members of the conspiracy are. One defendant may only
16 know one other member of the conspiracy, yet if he knowingly
17 cooperates to further the illegal purpose of the conspiracy
18 with knowledge that others have combined to violate the
19 law, he becomes a member, although his role may be only an
20 insignificant or subordinate role.

21 Now, if you find that a defendant did join the
22 conspiracy with knowledge of its illegal purpose, then he
23 is bound by what the others say and do afterward in further-
24 ance of the objects of the conspiracy, even though he
25 himself is not present, provided he is still a member of the

1
2 conspiracy, because each conspirator is the agent or
3 partner of every other conspirator. What one does to promote
4 the illegal venture or plan binds every other member of the
5 conspiracy. Note, though, that a defendant, even if he joins
6 the conspiracy, is not bound by the acts of conspirators which
7 occurred before you, the jury, find that he did join the con-
8 spiracy.

9 Here, for example, there are five exhibits in
10 evidence of what the chemist would have told us, if he were
11 here, and what the parties have stipulated the chemist would
12 testify, were heroin, Exhibits 1 through 5. The evidence here,
13 however, fails to connect these defendants with those earlier
14 first four exhibits and the sales connected with them. You
15 cannot find, on the basis of those first four, that these
16 defendants joined in the conspiracy. That evidence as to
17 those first four transactions can only be considered by you
18 in determining the question of whether a conspiracy existed,
19 the first element.

20 On the question of whether these defendants joined
21 the conspiracy, you can only consider Exhibit 5, the package
22 involved in the July 8 transaction, as tending and bearing on
23 the question of whether they did join the conspiracy.

24 You will recall that the third element of the
25

2 crime is the commission by any conspirator of at least one
3 overt act in furtherance of the object of the conspiracy.

4 "Overt act" means an act by any member of the
5 conspiracy in an effort to accomplish some purpose of the
6 conspiracy. The reason the law requires proof of an overt
7 act is because a person might agree with another to commit
8 a crime and then change his mind. Therefore, before a
9 defendant can be convicted of conspiracy, one or more of
10 the conspirators, whether or not it is one of those now on
11 trial, must have taken at least one overt step or performed
12 one single act which moved directly toward carrying out
13 the unlawful intent of the conspiracy.

14 The Government here alleges seven overt acts.
15 The first of these is that on or about June 3, 1975,
16 Rafael Gonzalez possessed approximately 24.84 grams of
17 heroin.

18 2. On or about June 23, 1975, Rafael Gonzalez,
19 the defendant, possessed approximately 33.66 grams of heroin.

20 3. On or about July 8, 1975, Rafael Gonzalez
21 and Hermengildo Diaz-Caballero, also known as Puton,
22 the defendants, had a conversation.

23 4. On or about July 8, 1975, Diaz-Caballero
24 and Efrain Maldonado, the defendants, possessed approxi-
25 mately 494.59 grams of heroin in the trunk of the automobile

1 of Efrain Maldonado, the defendant.

2
3 5. On or about July 8, 1975, Diaz-Caballero,
4 the defendant, opened the trunk of the automobile of
5 Maldonado, the defendant.

6 6. On or about July 8, 1975, Rafael Gonzalez
7 removed a package containing approximately 494.59 grams
8 of heroin from the trunk of the automobile of Efrain
9 Maldonado.

10 7. On or about July 8, 1975, Diaz-Caballero
11 placed a package containing approximately 494.59 grams of
12 heroin into the trunk of Efrain Maldonado, the defendant.

13 You will note that upon reading the indictment --
14 and I will send a copy of it in to you -- that some of
15 these acts are innocent in and of themselves. Nevertheless,
16 if those acts were performed by a member of the conspiracy
17 during the existence of the conspiracy and in furtherance
18 of its criminal purpose, then those acts are sufficient
19 to satisfy the third element.

20 Now, the Government is not required to prove
21 that all seven acts alleged were committed; it is enough
22 if the Government proves beyond a reasonable doubt that
23 at least one of the overt acts was committed in furtherance
24 of the conspiracy by any one or more members of the
25 conspiracy.

2 The Government in this connection is not required
3 to prove that the act happened on the exact date alleged;
4 it is sufficient if you find that the date in the testimony
5 is within a few weeks of the date alleged.

6 The same is true of the places. It doesn't have
7 to be the exact place; they must be substantially similar,
8 however.

9 You must consider each defendant separately.
10 If you find that the Government has failed to prove to your
11 satisfaction beyond a reasonable doubt all three elements
12 of the crime of the conspiracy, as I have defined them,
13 then you must acquit the defendant whom you are considering
14 on Count 1.

15 On the other hand, if you find that the Government
16 has proved to your satisfaction beyond a reasonable doubt
17 the existence of a conspiracy as alleged in the indictment, that
18 the defendant whom you are considering knowingly joined the
19 conspiracy with knowledge of its unlawful purpose, and that
20 any one of the conspirators committed at least one conspiracy,
21 then you may convict that defendant on Count 1.

22 Now, Count 4 of the indictment charges the
23 defendant Diaz-Caballero and Maldonado with actually dis-
24 tributing heroin and possessing heroin with an intent to
25

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2 distribute it.

3 Here, again, you must consider each defendant
4 separately. Before you can find either defendant guilty
5 on Count 4, the Government must prove to your satisfaction
6 beyond a reasonable doubt each of the following elements:

7 1. That on or about July 8, 1975, the defendant
8 either distributed heroin or possessed heroin with an intent
9 to distribute it.

10 While Count 4 charges both distribution of heroin
11 and possession of heroin with an intention to distribute it,
12 the Government is not required to prove both. The first
13 element is satisfied if you find beyond a reasonable doubt
14 that the defendant either intentionally distributed heroin
15 or knowingly possessed heroin with an intention of distrib-
16 uting it.

17 The word "distribute" means the actual or
18 constructive or attempted transfer of the drug.

19 The word "possession" means either actual physical
20 possession of the heroin or such power or control over
21 the drug that the defendant could move it himself or cause
22 or direct others to move it at his command. This is
23 what is known as constructive possession.

24 The word "intent" refers to a person's state of
25 mind.

So the term, "possess with intent to distribute" means to control a narcotic drug with a state of mind or purpose of transferring it.

The second element is the substance which was distributed or possessed with intent to distribute was, in fact, heroin. In this connection, the second element is satisfied if you believe the stipulated testimony of the Government chemist that the contents of Exhibit 5, which has been received in evidence, is heroin.

The third element is that in distributing heroin or possessing heroin with an intention to distribute it, the defendant acted knowingly and wilfully. As to the third element, you will consider and apply all that I have previously told you on the subject of what constitutes knowing, wilful and unlawful participation in a crime.

Moreover, as to Count 4, it is not necessary for the Government to prove that the defendant whom you are considering actually distributed heroin or possessed heroin with an intention to distribute it himself. The law provides that a person who aids and abets another, that is, somebody who helps another person, knowingly helps him to commit a crime, is just as guilty of that crime as if he had personally committed it himself.

Accordingly, you may find a defendant whom you are

2 considering guilty of the crime charged in Count 4 if you
3 find beyond a reasonable doubt that that defendant aided
4 and abetted some other person in the commission of the
5 crime charged in that count.

6 Before you can convict a defendant for aiding
7 and abetting, however, you must find that someone else did,
8 in fact, commit the crime, here, for example, Gonzalez,
9 and that the defendant consciously associated himself
10 with the criminal venture and with an intent that his
11 conduct would help it succeed. You must be convinced beyond
12 a reasonable doubt that he was doing something to aid the
13 crime or to forward or promote the crime of the other person,
14 that he was a conscious, knowing participant in the crime
15 with a stake in its success, rather than a mere witness,
16 spectator or bystander on the scene of the crime when a
17 crime was committed by another.

18 It is no crime simply to witness a crime by others;
19 it is only a crime if you are in on it as an aider and
20 abettor helping him commit it.

21 As to Count 4, you should consider each defendant
22 separately.

23 If, after considering all of the evidence, you
24 find as to the defendant whom you are considering that the
25 Government has failed to prove to your satisfaction beyond

1 a reasonable doubt all three elements of the crime charged
2 in Count 4, as I have defined them, and has failed to prove
3 that the defendant aided and abetted another in committing
4 the crime charged in that count, then you must acquit that
5 defendant on Count 4.
6

7 On the other hand, if after considering all of
8 the evidence you find as to the defendant whom you are
9 considering that the Government has proved to your satis-
10 faction beyond a reasonable doubt each of the three elements
11 of the crime charged in Count 4 as I have defined them, or
12 has proved that that defendant aided or abetted another
13 in committing the crime charged in that count, then you
14 should convict that defendant on Count 4.

15 You are instructed that the question of possible
16 punishment of a defendant in the event of a conviction is
17 no concern of yours, and it should not in any sense enter
18 into or influence your deliberations. The duty of imposing
19 sentence in the event of a conviction rests exclusively
20 upon the Court. Your function is to weigh the evidence
21 in the case and decide the guilt or innocence of each
22 defendant solely upon the basis of that evidence.

23 . When you retire to the jury room, treat one
24 another with courtesy and with respect and consideration,
25 as I know you will. If differences of opinion arise, your

discussions should be dignified, calm and intelligent. Your verdict must be based on the evidence and the law, the evidence which was presented in this case as you remember it, and the law as I have given it to you in these instructions

You are each entitled to your own opinion. No juror should acquiesce in a verdict against his individual judgment. But, on the other hand, no juror should enter a jury room with such pride of opinion that he would refuse to change his or her mind no matter how convincing the arguments and the presentations of his fellow jurors are.

Discussion and deliberation are at the very heart of our democratic jury process, and that process lies at the very heart of our democratic government. Your deliberations should be approached in that spirit. Talk out your differences.

Each of you should, in effect, decide the case for himself or herself after reviewing the evidence, frankly discussing it with your fellow jurors with an open mind and with a desire to reach a verdict. If you do that, you will be acting in the true democratic process of the American jury system.

The alternate jurors will be excused at the conclusion of this charge with the thanks of the Court.

Any verdict of the remaining twelve jurors must

be the unanimous verdict of all of you, and it must represent the honest conclusion of each of you.

I submit the case to you with every confidence that you will fully measure up to the oath which you took as members of the jury to decide the issues submitted to you fairly and impartially and without fear and without favor.

Now, members of the jury, if you find that the Government has failed to establish the guilt of the defendant whom you are considering beyond a reasonable doubt, that defendant should be acquitted. You should not hesitate for any reason to render a verdict of not guilty if the Government has failed to establish the guilt of that defendant beyond a reasonable doubt.

But, on the other hand, if you find that the Government has established the guilt of the defendant whom you are considering beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

Your foreman, then, will return an oral verdict in open court as to each defendant of guilty or not guilty on Count 1 and guilty or not guilty on Count 4.

Sometimes, during your deliberations, foremen send me notes, "We stand this way or we stand that way; we

2 are disagreed."

3 I don't care. If you disagree, that is something,
4 but I don't want to know how you stand. That is not my
5 concern. Just when you have reached a verdict or whether
6 you can't reach one, but, as I said, you should approach
7 your job here with a view to reaching a verdict.

8 Are there any exceptions, gentlemen? If so, I
9 will hear you at the side bar.

10 (At the side bar)

11 MR. SCHECHTER: Firstly, in the United States
12 Attorney's summation he vouched for the credibility or the
13 believability of his witnesses, and I think that was error,
14 and on that basis I would ask for a mistrial.

15 THE COURT: What did he do?

16 MR. SCHECHTER: I believe in his statements to
17 the jury he vouched for the credibility or believability
18 of his witnesses.

19 THE COURT: What do you want me to tell the jury?

20 MR. SCHECHTER: I believe that that is ground for
21 a mistrial.

22 THE COURT: What do you want me to tell them?

23 MR. SCHECHTER: That you are the judges only
24 of the credibility of the witnesses, that anything that
25 the U. S. Attorney said is not evidence whether you should

2 believe them or not believe them.

3 THE COURT: All right.

4 (In open court)

5 THE COURT: I want to say, as I told you, you
6 are the exclusive judges of the credibility of every witness.
7 If any of the lawyers, the Assistant U. S. Attorney or
8 any defendant's attorney, expressed any view of his own
9 about the believability of the witnesses, he was out of
10 bounds, and disregard it. You are the exclusive judges.

11 (At the side bar)

12 THE COURT: Satisfactory?

13 MR. SCHECHTER: Yes, sir.

14 I take exception to so much of your Honor's
15 charge as you said actions speak louder than words. I
16 think with regard to whether the jury would believe that --

17 THE COURT: Your exception is noted.

18 MR. SCHECHTER: I believe when your Honor stated
19 the manner in which the defendants carried on the affairs
20 of the plan, I believe that that would be if you believe
21 that a defendant participated in the plan.

22 THE COURT: I think you misquote me, but anyway
23 I note your exception. I get your point.

24 MR. SCHECHTER: I at this time renew my motion
25 to dismiss on the grounds that the U. S. Attorney did not

1
2 establish ownership of the automobile that he alleges
3 was owned by Maldonado any place in his proof.

4 THE COURT: How is that material to this crime?

5 MR. SCHECHTER: It is alleged as one of the
6 overt crimes, that Maldonado was driving his car.

7 THE COURT: I think that would be something that
8 is not fatal, and decline to do anything about it at this
9 stage of the game.

10 MR. SCHECHTER: I also take exception to so much
11 of your Honor's charge as you indicate that there is a
12 danger to the public when two or more persons conspire
13 to commit a crime.

14 I thought that the language was an unfortunate
15 choice of words, and I thought might be somewhat inflammatory.

16 THE COURT: It comes from the Supreme Court.

17 I note your exception.

18 MR. SCHECHTER: Thank you, your Honor.

19 THE COURT: It may be unfortunate. The appellate
20 courts often use unfortunate words.

21 MR. SCHECHTER: Thank you, Judge.

22 MR. BERNSTEIN: Nothing, your Honor.

23 (In open court)

24 THE COURT: The alternates are excused.

25 (Two alternate jurors were excused)

2 THE COURT: I have another matter on, so if you
3 send anything to me, it may be delayed a little before
4 I get to it. I want you to understand that. I will get
5 to you as soon as I can.

6 (At 3:20 p.m. the jury retired to begin
7 deliberation upon a verdict.)

8 (Recess)

9 (At 4:05 p.m., a note was received from the
10 jury.)

11 (In open court; jury not present)

12 THE COURT: Just let the record note I have shown
13 Court Exhibit 1 to defense counsel while we are waiting
14 for the Assistant U. S. Attorney.

xxx

15 (Court Exhibit No. 1 was marked.)

16 (Pause)

17 THE COURT: Mr. Marmaro, I am a busy guy. You
18 stay in this courtroom while this trial is in progress
19 and don't leave it without my permission.

20 MR. MARMARO: We have been waiting here ten
21 minutes for you. I have another trial upstairs with
22 two hundred people. I am sitting around waiting for you.
23 Have somebody on deck here.

24 Bring in the jury.

25 (At 4:15 p.m., the jury entered the courtroom.)

THE COURT: I have your note:

"We need a clarification as to whether or not all three conditions or elements of the conspiracy count, Count 1, must be met in order to convict on Count 1."

Yes.

Next question:

"Asl with respect to Count 4, is it correct that only one condition must be met, that is, actual distribution of heroin or possession with intent to distribute?"

Proof of either actual distribution or of possession with intent to distribute is sufficient along with the other elements of the crime which I charged you about. I'm sure you recall those. If you don't, send me another note right away and I will give them to you.

You may retire now and continue on your deliberations.

(At 4:16 p.m., the jury returned to the jury room to continue to deliberate upon a verdict.)

(At 4:18 p.m, the jury returned to the courtroom.)

THE COURT: I have this second note, "We need the three conditions on Count 1."

1. The existence of a conspiracy.

You will recall that I told you in some detail that requires a combination or an agreement of two or more

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2 people. That is Element 1.

3 Element 2. That the defendant whom you are
4 considering joined that conspiracy with knowledge that
5 its purpose was to distribute narcotics or to possess them
6 with intent to distribute.

7 Element 3. That at least one member of the
8 conspiracy committed at least one of the seven overt acts
9 charged in the indictment.

10 I think that answers your question. Retire
11 for your deliberations.

12 (At 4:20 p.m., the jury returned to the jury
13 room to continue to deliberate upon a verdict.)

xxx

14 (Court's Exhibit No. 2 was marked.)

15 (At 4:50 p.m., in open court, jury present)

16 (Jury roll polled -- all present)

17 THE CLERK: Mr. Foreman, has the jury agreed
18 upon a verdict?

19 THE FOREMAN: Yes.

20 THE CLERK: How do you find the defendant Diaz-
21 Caballero on Count 1?

22 THE FOREMAN: Diaz-Caballero guilty on Count 1.

23 THE CLERK: How do you find the defendant Diaz-
24 Caballero on Count 4?

25 THE FOREMAN: Guilty on Count 4.

2 THE CLERK: How do you find the defendant
3 Maldonado on Count 1?

4 THE FOREMAN: Innocent on Count 1.

5 THE CLERK: How do you find the defendant
6 Maldonado on Count 4?

7 THE FOREMAN: Innocent on Count 4.

8 THE CLERK: Ladies and gentlemen of the jury,
9 listen to your verdict as it now stands recorded.

10 You say you find the defendant Diaz-Caballero
11 guilty on Counts 1 and 4. You say you find the defendant
12 Maldonado not guilty on Counts 1 and 4. And so say you all.

13 (Each juror, upon being asked, "Is that your
14 verdict?", answered in the affirmative.)

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